APPENDIX

2nd Court of Appeals Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 519—September Term, 1966.

(Argued June 20, 1967 Decided July 3, 1967.)

Docket No. 31403

UNITED STATES OF AMERICA,

Appellee,

—v.—

DAVID ARTHUR GEAREY,

Appellant.

Before:

LUMBARD, *Chief Judge,*
FRIENDLY and KAUFMAN, *Circuit Judges.*

Appeal from the reinstatement of a judgment of conviction (previously vacated by this Court and remanded) for failing to submit for induction into the armed forces, in violation of 50 U. S. C. App. §462(a), entered in the United States District Court for the Southern District of New York, Thomas F. Murphy, *J.*, after a hearing directed by this Court. See 368 F. 2d 144, 151 (1966).

Affirmed.

MARVIN M. KARPATKIN (Rhoda H. Karpatkin, Karpatkin, Ohrenstein & Karpatkin, New York, N. Y., on the brief), *for appellant.*

PAUL K. ROONEY, Assistant United States Attorney (Robert M. Morgenthau, United States Attorney for the Southern District of New York; John S. Allee, Assistant United States Attorney, on the brief), *for appellee.*

KAUFMAN, *Circuit Judge*:

We previously vacated the conviction of David Arthur Gearey for refusing to submit for induction into the armed forces, in violation of 50 U. S. C. App. §462(a), and remanded the case to the District Court for a hearing on areas that were in need of elucidation. 368 F. 2d 144 (1966). Judge Murphy, who had been the trial judge, conducted the hearing. Thereafter, he reinstated Gearey's conviction and sentence of 2 years' imprisonment. Appellant asks us, once more, to set aside his conviction, claiming, *inter alia,* that the District Court failed at the hearing to follow the directions contained in our opinion. In addition, he urges that the Local Board's refusal to reclassify him as a conscientious objector was based on an erroneous view of the law.

I.

The facts leading to Gearey's conviction are set forth fully in our prior opinion and we shall therefore avoid a detailed recital of the tortuous Selective Service proceedings that stretched over a 6-year period. Between October 1960, when Gearey first registered with his Local Board and January 1965, he received student deferments, never claiming to be a conscientious objector. In mid-February 1965, appellant's Draft Board was notified by St. Francis

College that Gearey was no longer enrolled as a student. When appellant failed to provide proof of attendance, the Board revoked his student deferment (2-S) and reclassified him I-A (available for military service). On April 19, an Order to Report for Induction on May 5 was mailed to appellant. But on April 23 Gearey asked that his I-A classification be reviewed and that the date of induction be postponed. The Board complied by rescheduling his induction for July.

It was not until May 24, however, that Gearey for the first time asked the Board to send him the special questionnaire for conscientious objectors (SSS Form #150). After the form was returned to the Board, Gearey was invited to appear for an interview on July 6. Upon the conclusion of that hearing, Gearey was informed by the Board that it did not believe he was a "genuine c.o" and, therefore, a change in his classification was not warranted.[1] Two days later appellant appeared for induction, but refused to take the symbolic step forward when ordered to do so. He was subsequently arrested, tried by Judge Murphy, sitting without a jury, and convicted.

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[1] The following summary of that hearing was prepared by the Board:

> Registrant interviewed, had decided just recently to become a c.o., said he had been thinking about it but never mentioned it. We reviewed the c.o. #150, also reviewed letter sent by Bishop Ford High School. Registrant claims he is not working there nor that he would definitely be working there in September. Said he would like to go to Europe and take pictures since this is the vocation he wants to pursue or maybe teach when he returns. The board after reviewing the evidence submitted and registrant's claims felt he did not qualify to be a genuine c.o. All facts considered did not warrant a change in classification. He was advised to report as scheduled. Vote was 4 to 0.

II.

On his first appeal, Gearey's principal argument was that he had been improperly denied the procedural safeguards (including the right to present his case to the Selective Service Appeal Board) contained in §6(j) of the Universal Military Training and Service Act, 50 U. S. C. App. §456(j).[2] The government, on the other hand, contended that the Local Board was barred from considering appellant's claim of conscientious objection by 32 C. F. R. §1625.2, which provides in part:

> The local board may reopen and reclassify anew the classification of the registrant . . . provided . . . the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction . . . unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.

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[2] That section provides in part that:

> Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned and such person shall be notified of the time and place of such hearing. . . . If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board.

We recognized that §1625.2 was a reasonable regulation, designed to require registrants to raise their claims for deferment as soon as they had matured, thereby avoiding a process of endless challenges. Any other construction, we believed, would work havoc upon the Selective Service System and manpower quotas could rarely be met with any reasonable degree of certainty. We therefore concluded that it was entirely just to require that claims be raised within reasonable time limits in the interest of orderly administrative proceedings. Thus, it was proper to apply §1625.2 to registrants whose claims, though maturing *before* an Order to Report for Induction had been mailed, were not presented to the Board until *after* the receipt of that order. Such individuals, it seemed clear to us, were afforded ample opportunity to raise their claims before receiving an order to report, and had no justifiable complaint when the Board refused to reopen their classification.

But, we went on to note, "the considerations are quite different . . . when a claim of conscientious objection, raised for the first time after receipt of an induction notice, is based on a claim *which had not previously matured*. . . . It would be improper to conclude that an individual is not a genuine conscientious objector merely because his beliefs did not ripen until after he received his notice . . . ." 368 F. 2d at 149-50. (Emphasis added; footnote omitted.) This country's long history of exempting conscientious objectors, together with the statutory rights afforded to such claimants, led us to conclude that one who raised a claim of conscientious objection promptly after it matured, had a right to have the Board consider his request for reclassification—even if the claim was not raised until after an induction notice had been sent. Applying these principles to Gearey's case, we concluded that the District Court

should determine whether the Board had erroneously refused to consider appellant's claim solely because it was not raised until after he received his induction notice.

Upon remand, Judge Murphy conducted a hearing at which Board Chairman Frank Barbiere, Board Secretary William Hatterschied, and Board Member Thomas Elmezzi were questioned by an Assistant United States Attorney, and then subjected to intense cross-examination by defense counsel.[3] The Judge, however, declined to permit Gearey to testify or to introduce in evidence a memorandum (Defendant's Exhibit A for Identification) containing his recollections of the July 6 interview with the Board.

Based upon the testimony elicited at this hearing, Judge Murphy concluded that when the Board interviewed Gearey on July 6, the members were ready to reclassify him as a conscientious objector, despite the induction notice, if they could be persuaded that his claim was sincere. Judge Murphy found that the Board believed that Gearey "was not then, and never had been a genuine conscientious objector," 266 F. Supp. 161 (S. D. N. Y. 1967) and for this reason refused to reclassify him. The District Judge also held that the evidence adduced both at the trial and at the remand indicated that there was a rational basis for this conclusion, and, accordingly, he reinstated Gearey's conviction.[4]

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[3] James P. McGrattan, the other member of the Board who interviewed Gearey, was unable to recall appellant or the interview.

[4] Judge Murphy also ruled that Gearey's beliefs had matured before the induction notice was sent to him. Because we agree with Judge Murphy that the Board rationally concluded that Gearey was not a genuine conscientious objector, we find it unnecessary to consider this alternate holding.

III.

Two of appellant's claims need not detain us long. Gearey argues that the testimony of the Board members demonstrated that they rejected his claim of conscientious objection either "exclusively or principally because of its lateness," and that this was contrary to the rule of law announced in our earlier decision. Our response to this is that appellant misreads the opinion in *Gearey I*. We remanded the case because we were uncertain whether the Board had refused to reopen Gearey's classification "on the ground that [he] had not advanced his claim before the mailing of the induction notice, even though the claim had not matured until later." 368 F. 2d at 151. The District Court, therefore, was to determine whether the Board had refused to *consider* appellant's claim simply because of the late date at which it was raised. But we explicitly noted that "the belatedness of a claim may be a factor in assessing its genuineness." *Id.* at 150.

Our review of the record reveals overwhelming support for Judge Murphy's finding that the members of the Board did consider Gearey's claim despite the receipt by him of an induction notice, and that he would have been reclassified if his conscientious objection claim were genuine.[5]

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[5] Member Barbiere, for example, gave the following testimony:

The Court: Were you committed on one line of thinking or some other line?

The Witness: We were pretty wide open to accept if he came in with a good reason. We were hoping for a good reason.

The Court: You would have accepted him as a conscientious objector?

The Witness: We would.

The Court: If you were satisfied?

The Witness: Yes, we would. [Record of Hearing at 91.]

While it appears that the belated nature of the claim did cause skepticism concerning its sincerity, we can see no impropriety in considering this element. In any event, this was but one of several factors which the Board relied upon in denying appellant's claim. See part IV, *infra*.

Equally without merit is Gearey's contention that the Local Board failed to follow the procedures set forth in our prior decision, since no effort was made to determine when Gearey's beliefs matured. Here too, appellant has misread our opinion. We were merely setting forth guidelines to be followed by Local Boards in the future when confronted with a post induction notice claim of conscientious objection.

> [T]he Local Board must first determine when an applicant's beliefs matured. If the Board properly concludes that the claim existed before the notice was sent, the classification may not be reopened. If the Board finds, however, that the applicant's beliefs ripened only after he received his notice, and that his beliefs qualify him for classification as a conscientious objector, then a change in status would have occurred "resulting from circumstances over which the registrant had no control," and he would be entitled to be reclassified by the Local Board. 368 F. 2d at 150. (Footnote omitted.)

This procedure was devised in order to insure that Boards will hereafter reach the merits of a registrant's claim of conscientious objection, despite its assertion after the receipt of an induction notice, provided his beliefs had not matured before that time. But when the record reveals, as it does in the present case, that the Board members have

in fact considered the registrant's claim on its merits, and have rejected it only because they believe that it is not genuine, it would be labor in vain to require the Board to determine when the claim matured. We made this clear in *Gearey I* when we instructed the District Court that:

> If [the Board] meant either that Gearey never was "a genuine c.o." *or* that whatever his beliefs were on the subject, they had matured before the induction notice was sent, and if the judge is convinced of the rationality of such a view, Gearey's conviction may stand; otherwise the indictment must be dismissed. 368 F. 2d at 151. (Emphasis added; footnote omitted.)

IV.

Gearey raises two other arguments which require further analysis. He contends that his conviction must be reversed because the Board relied on an erroneous reason in refusing to reclassify him. Appellant refers us specifically to the testimony of members Barbiere and Elmezzi who, he says, stated that Gearey did not qualify as a conscientious objector because he allegedly answered, in response to pointed queries, that he would use force to ward off an attack on his "girl" or other loved ones.

It is true, as appellant contends, that a registrant's belief in the use of force in self-defense is not inconsistent with a conscientious objection to participation in war in any form. See *Sicurella* v. *U. S.*, 348 U. S. 385 (1955); *Jessen* v. *U. S.*, 212 F. 2d 897 (10th Cir. 1954) (footnote omitted); *U. S.* v. *Hartman*, 209 F. 2d 366 (2d Cir. 1954); *U. S.* v. *Pekarski*, 207 F. 2d 930 (2d Cir. 1953); *Taffs* v. *U. S.*, 208 F. 2d 329 (8th Cir. 1953), *cert. denied*, 347 U. S. 928 (1954); *U. S.* v. *Parmiter*, 173 F. Supp. 677, 687-89 (S. D. N. Y. 1959). But

in each of the cited cases the evidence was *uncontroverted* that the registrant was opposed to participation in war.[6] In such circumstances, reversal was proper because "a person's willingness to use force in self-defense is not a valid objection to denial of conscientious objector status *where other evidence of his opposition to participation in war because of religious belief is undisputed.*" *Taffs* v. *U. S.*, 208 F. 2d at 331. (Emphasis added.)

In this case, by contrast, the record is clear that there is no substance to any contention that Gearey's opposition to war was "undisputed." Indeed, the sincerity of his views was the very issue before the Board; and, it is clear from the testimony that many unquestionably valid considerations led the Board members to reject the genuineness of appellant's claim. For example, they observed Gearey's demeanor at the interview and testified that he seemed to be principally concerned with "furthering his education by going to Europe and taking pictures," and not with being reclassified as a conscientious objector. The members also stated that Gearey had refused to reveal his reasons for rejecting a teaching position at Bishop Ford High School which he had previously indicated he would accept, and that between June 7 and July 6, 1965 he denied, affirmed, and again denied that he was a member of the Catholic Church. Finally, the Board members were skeptical of Gearey's claim because of the entire untidy history of vacillation disclosed by his numerous requests for deferments over the 6-year period on diverse grounds, and his failure to seek reclassification as a conscientious objector until post induction notice. They were bolstered in their skep-

[6] In *Sicurella*, it was admitted that the registrant was sincere in his beliefs, and in all the other cases the defendants were Jehovah's Witnesses.

ticism by what they characterized as his "evasive" responses at the July 6 interview.

It is well established that the scope of judicial review in Selective Service cases is exceedingly narrow.[7]

> [I]t is not for the courts to sit as superdraft boards, substituting their judgments on the weight of the evidence for those of the designated agencies. Nor should they look for substantial evidence to support such determinations. *Dickinson* v. *United States,* 346 U. S. 389, 396 (1953). The classification can be overturned only if it has "no basis in fact." *Estep* v. *United States,* 327 U. S. 114, 122 (1946).
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> *Witmer* v. *U. S.,* 348 U. S. 375, 380-81.

The record before us supplies more than ample evidence to support the Board's conclusion that Gearey was not sincere in his belief; and in cases involving conscientious objectors, "any fact which casts doubt on the veracity of the registrant is relevant." *Witmer* v. *U. S.,* 348 U. S. at 381-82.

Moreover, we see no merit to Gearey's contention that his conviction must be reversed because the Board in deny-

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[7] 50 U. S. C. §460(b)(3) provides that decisions of the Local Boards are "final" except for administrative review. The Supreme Court has interpreted this finality to mean that:

> Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant.

U. S. v. *Seeger,* 380 U. S. 163, 185 (1965), quoting *Estep* v. *U. S.,* 327 U. S. 114, 112-23 (1946).

ing his claim *may* have relied to some extent on his answers regarding the use of force in self-defense. The decisions cited by appellant[8] are clearly inapposite; there judgments were reversed because there was a firm basis for believing that the registrant had been classified pursuant to a mistaken notion that his beliefs did not fall within the statutory standards for conscientious objection—in the various cases, the Department of Justice had incorrectly advised the Selective Service System that the registrant's beliefs did not qualify under the statute—and the reviewing court thus could not determine whether the denial of the registrant's claim was based upon a proper or an improper ground. We face no such quandary here, however, since we have no sufficient basis for believing that the Board utilized an improper standard in denying Gearey's claim; to the contrary we have the benefit of the testimony of the Board members revealing beyond question that valid considerations led to their rejection of Gearey's claim.

V.

Lastly, we consider Gearey's argument that the District Court erred by refusing to permit appellant to testify or to introduce in evidence the memorandum containing his recollections of the July 6 interview with the Board. We have already noted that this case was remanded for the limited purpose of determining whether the Board refused to consider Gearey's claim because it had been raised post Notice to Report for Induction. We cannot see the rele-

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[8] *Sicurella* v. *U. S., supra; U. S.* v. *Jakobson,* 325 F. 2d 409 (2d Cir. 1963), aff'd sub nom. *U. S.* v. *Seeger, supra; U. S.* v. *Kretchet,* 284 F. 2d 561 (9th Cir. 1960); *U. S.* v. *Ypparila,* 219 F. 2d 465 (10th Cir. 1954); *U. S.* v. *Shepherd,* 217 F. 2d 942 (9th Cir. 1954); *U. S.* v. *Hagaman,* 213 F. 2d 86 (3d Cir. 1954); *U. S.* v. *Erikson,* 149 F. Supp. 576 (S. D. N. Y. 1957).

vance of Gearey's testimony to this issue. Certainly, he could not reveal the *mens* or thought processes of the Board members.[9] And we cannot overlook the fact that despite intense cross-examination, the members remained steadfast in their assertion that Gearey's claim was considered on its merits and that they were prepared to reclassify him if deserving, but declined to do so because they believed his claim was not sincere.

The record reveals instead that counsel desired Gearey's testimony so that he could introduce the memorandum of the July 6 interview.[10] In any event, substantial portions of that document were placed before the Court during the

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[9] The following colloquy illustrates that Gearey was not prepared to so testify:

> Mr. Karpatkin: Well, I would like to say this first, your Honor. Obviously, I am aware of the unusual nature of this proceeding, as the rest of us are, and if your Honor is not prepared to grant the relief which I am going to ask you to grant either by this motion or application I want to argue before you, then I would want to put Mr. Gearey on the stand.
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> The Court: Well, I would like to address myself to that now. I gathered from the various questions that you do propose to call him and to ask him the questions that were the basis really of the questions you asked the members of the Board. I take it you have in your possession some kind of memorandum he made which he says was his recollection of what transpired that evening. Whether he made it or not, I don't know. But it is that that you propose to have Mr. Gearey testify to, I guess?
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> Mr. Karpatkin: Yes, your Honor.
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> The Court: His recollection of what he remembers of what transpired on the evening of July 6th?
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> Mr. Karpatkin: Yes, your Honor. [Record of Hearing at 194-95.]

Counsel's offer of proof at the first trial also reveals that appellant was not planning to testify as to the state of mind of the Board members. See Record of Trial at 95-99.

[10] "Mr. Karpatkin: May I respectfully say, your Honor, that I propose to call Mr. Gearey for the purpose of seeking to introduce into evidence a certain memorandum." Record of Hearing at 197.

cross-examination of the Board members. And since Gearey included the memorandum in his Appendix on this appeal, we have considered its contents as if the exhibit were in evidence. We see nothing in it, however, which would indicate that the Board members refused to give consideration to appellant's claim; rather, the document reveals that the members made a conscientious effort to determine whether Gearey's claim was genuine. And, the memorandum does not reveal that the Board had no basis upon which it could reasonably have concluded that appellant was not sincere in asserting a claim of conscientious objection. In these circumstances, we cannot say that the District Court's refusal to permit Gearey to testify at this limited hearing, or its failure to receive in evidence the memorandum, constituted reversible error.

We have considered appellant's other claims and find them equally lacking in merit.[11]

Judgment affirmed.

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[11] We reject, for example, appellant's argument that *U. S.* v. *Vincelli*, 215 F. 2d 210 (2d Cir. 1954), which we considered in the first *Gearey* case, stands for the principle that, upon the presentation of new information of a non-frivolous nature, the Board must reopen a registrant's classification, even if it decides to adhere to the prior classification. The cases cited by appellant, which have interpreted *Vincelli*, clearly indicate that the Board must reopen only if the registrant has made out a prima facie case, based on objective facts, that he is entitled to be reclassified. See, e.g., *U. S.* v. *Burlich*, 257 F. Supp. 906 (S. D. N. Y. 1966) (prima facie case that registrant was entitled to a hardship exemption). Gearey, however, made no such showing. Moreover, in the cases referred to by appellant, the request for reclassification was made *before* the registrant had been sent an induction notice, so that the Board had the power to reopen without a showing that "there has been a change in the registrant's status resulting from circumstances over which the registrant had no control." 32 C. F. R. §1625.2.

We also decline to reconsider our prior holding that Gearey was not authorized to appeal, pursuant to §6(j), from the Board's adverse determination of his sincerity. See 368 F. 2d at 151.

2nd Court of Appeals Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the third day of July one thousand nine hundred and sixty-seven.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,

HON. HENRY J. FRIENDLY,
HON. IRVING R. KAUFMAN,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DAVID ARTHUR GEAREY,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

By: VINCENT A. CARLIN
Chief Deputy Clerk

2nd District Court Opinion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

April 17, 1967

No. 65 Cr. 828

UNITED STATES OF AMERICA,

v.

DAVID A. GEAREY,

Defendant.

Prosecution for failing to submit to induction into the armed forces. The United States District Court for the Southern District of New York, 260 F.Supp. 7, entered a judgment of conviction and the defendant appealed. The United States Court of Appeals for the 2nd Circuit, 368 F.2d 144, vacated and remanded for further proceedings. On remand, the District Court, Murphy, J., held that evidence adduced at hearing showed that local draft board in finding that defendant was not a genuine conscientious objector meant that he was not then and never had been a genuine conscientious objector, and there was a rational basis for this decision.

Conviction reinstated and sentence reimposed.

Robert M. Morgenthau, U. S. Atty., Southern District of New York, for plaintiff, Paul K. Rooney, Asst. U. S. Atty., of counsel.

Marvin Karpatkin, New York City, for defendant.

OPINION

MURPHY, *District Judge.*

The defendant was indicted for his wilful failure to submit to induction into the armed forces (50 App.U.S.C. §§ 451 et seq.). He waived a jury, was tried by the court and found guilty. Although no request for findings, Fed. R.Crim.P. 23(c), was made, the court filed its memorandum on March 14, 1966. United States v. Gearey, 260 F.Supp. 7 (S.D.N.Y. 1966). He was thereafter sentenced to a term of imprisonment of two years. On appeal, the Court of Appeals vacated the judgment of conviction and remanded for further proceedings. United States v. Gearey, 2 Cir., 368 F.2d 144 (2d Cir. 1966).

That court was disturbed over the form of the Local Board's finding that Gearey was not "a genuine c. o." It stated:

> "If the Board had found that Gearey's beliefs after the induction notice were no different than before, that would have sufficed, provided the judge found a rational basis for it. Again, if the Board had said clearly that in its view Gearey never had been and was not now 'a genuine c. o.,' that too would have sufficed, subject to the same proviso, since there could not be 'a change in the registrant's status resulting from circumstances over which the registrant had no control' if there had been no change at all. The Board's determination as to the sincerity of the claim, while ordinarily subject to an appeal with the safeguards of § 6(j), would not be in these circumstances because of the applicability of § 1625.2 to conscientious objector claims. While the Board's finding that Gearey was not

'a genuine c. o.' may have been a shorthand manner of expressing one or the other of the above views, it might also have meant that the Board was refusing to reopen on the ground that Gearey had not advanced his claim before the mailing of the induction notice, even though the claim had not matured until later.

"We see no reason, however, why the Board's failure to speak with pristine clarity should require dismissal of this indictment. A remand should enable the judge to ascertain from the Local Board precisely what it meant. * * * If it meant either that Gearey never was 'a genuine c. o.' or that whatever his beliefs were on the subject, they had matured before the induction notice was sent, and if the judge is convinced of the rationality of such a view, Gearey's conviction may stand; otherwise the indictment must be dismissed." 368 F.2d at 150-151.

Pursuant to such directions, a hearing was had on January 11th and 18, 1967, at which the testimony of the members of the Local Board was taken. (The transcript covers 202 pages). We are satisfied that the Board granted the interview to Gearey on July 6, 1965, in order to evaluate his application for a conscientious objector's classification and that they were prepared to honor his request for reclassification without regard to his outstanding induction order.

[1] From all the evidence adduced, we are satisfied that when the Local Board on July 6, 1955, found that Gearey was not "a genuine c. o.," it meant that he was not then, and never had been a genuine conscientious objector. We further find from this evidence and from the evidence adduced at the trial itself, that there was a rational basis for

this decision and, accordingly, reinstate his conviction and reimpose the same sentence as before, viz., that he be confined to the custody of the Attorney General for a period of two years.

Although such a finding renders moot the alternative ground outlined by the Court of Appeals for reinstating the defendant's conviction, i.e., if his beliefs matured before the induction notice was mailed to him, we are nonetheless satisfied that Gearey had long before made up his mind. In his letter of May 21, 1965, to the Board, he stated: "For the past several years I have been concerned with the problem of conscriptive service as it affects me. *Once* I resolved the problem in my own mind *I refrained from notifying the board* because I felt quite secure with my status as a student and I thought that I would have plenty of time to inform you after the completion of school." (Emphasis added).

[2] The members of the Local Board are ordinary citizens doing volunteer work for their country and, unfortunately, are not judges or even professional witnesses. Because they do not speak or write with pristine clarity is no reason to fault them. I found these board members to be honest, sincere, open-minded and without a trace of prejudice and recall "that it is not for the courts to sit as super draft boards, substituting their judgments on the weight of the evidence for those of the designated agencies." Witmer v. United States, 348 U.S. 375, 380-381, 75 S.Ct. 392, 395, 99 L.Ed. 428 (1955).

Finally, we refused to permit the defendant to testify as to his recollections of the interview on July 6, 1965, or to offer in evidence what is claimed to have been a memorandum of such recollections, on the ground that the directions of the Court of Appeals did not encompass such testimony or exhibit.

2nd District Court Judgment

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 65 Cr. 828

UNITED STATES OF AMERICA,

v.

DAVID ARTHUR GEAREY.

On this 17th day of April, 1967, came the attorney for the government and the defendant appeared in person and by counsel

IT IS ADJUDGED that the defendant having been convicted upon his plea of not guilty and a finding of guilty by the Court, defendant having waived trial by jury of the offense of unlawfully, wilfully and knowingly, upon reporting for induction pursuant to an Order to Report for Induction mailed to him by his Local Board, failing, neglecting and refusing to submit to induction into the Armed Forces of the United States. (Title 50, Appendix, U.S. Code, Section 462(a); 32 Code of Federal Regulations, Section 1632.14)

and

the judgment of April 19, 1966 having been vacated by the United States Court of Appeals and remanded to the District Court for further proceedings,

IT IS ADJUDGED, after further proceedings in this Court, that the verdict of guilty and sentence imposed on April 19, 1966 be reinstated, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of two (2) years.

Defendant continued on bail pending appeal.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

THOMAS F. MURPHY
United States District Judge.

JOHN J. OLEAR, JR.
Clerk

1st Court of Appeals Opinion

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Argued September 29, 1966—Decided October 21, 1966.

No. 86, Docket 30551

UNITED STATES OF AMERICA,

Appellee,

v.

DAVID ARTHUR GEAREY,

Appellant.

Appeal from judgment of conviction for failing to submit for induction into armed forces in violation of 50 U.S.C. App. § 462(a), after a trial without a jury before Thomas F. Murphy, J., in the United States District Court for the Southern District of New York. The Court of Appeals, Kaufman, Circuit Judge, held that if the local board's determination that defendant was not a genuine conscientious objector meant that defendant had never been one or that whatever his beliefs were on the subject, they had matured before induction notice was sent, conviction would stand, otherwise indictment must be dismissed.

Vacated and remanded for further proceedings.

Marvin M. Karpatkin, of Karpatkin, Ohrenstein & Karpatkin, New York City, for appellant.

Paul K. Rooney, Asst. U. S. Atty. (Robert M. Morgenthau, U. S. Atty., for S. D. New York; Richard A. Givens, Asst. U. S. Atty., on the brief), for appellee.

Before LUMBARD, *Chief Judge*, FRIENDLY and KAUFMAN, *Circuit Judges*.

KAUFMAN, *Circuit Judge*:

The military conflict which now engages the nation has prompted much debate over our system of conscription. This controversy has been manifest not only in Congressional hearings, but also in numerous judicial proceedings in which the draft laws have been challenged. Probably no provisions have been examined more closely than those relating to the deferment of conscientious objectors.[1]

David Arthur Gearey was convicted of violating 50 U.S.C.App. § 462(a)[2] because of his refusal to submit to

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[1] See, e.g., United States v. Seeger, 380 U. S. 163, 85 S. Ct. 850, 13 L. Ed. 2d 733 (1965), in which a unanimous Court held that the belief in a "Supreme Being" required of those claiming to be conscientious objectors, was the "sincere and meaningful belief which occupies in the life of the possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption." Id. at 176, 85 S. Ct. at 859. See also United States v. Jakobson, 325 F. 2d 409 (2d Cir. 1963), affirmed sub nom., United States v. Seeger, supra.

[2] "[A]ny person who * * * evades or refuses registration or service in the armed forces or any of the requirements of this title * * * or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in execution of this title * * * or rules, regulations, or directions made pursuant to this title * * * shall upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than 5 years or a fine of not more than $10,000, or by both such fine and imprisonment * * *"

Regulation § 1632.14 provides:

(a) When the local board mails to a registrant an Order to Report for Induction * * * it shall be the duty of the registrant to report for induction at the time and place fixed in such order. * * *

(b) Upon reporting for induction, it shall be the duty of the registrant * * * (5) to submit to induction * * *.

induction as ordered by his Local Selective Service Board. On this appeal, his principal contention is that although his claim of conscientious objection was not raised prior to receiving a Notice to Report for Induction (SSS Form No. 252), he was nevertheless entitled to the procedural safeguards provided for those claiming to be conscientious objectors in section 6(j) of the Universal Military Training and Service Act, 50 U.S.C.App. § 456(j).

In October 1960, upon attaining the age of 18, Gearey registered with his local draft board as required by law. He did not at that time request a draft exemption as a conscientious objector. Subsequently, he was granted a student deferment (2-S) because of his attendance at St. Francis College in Brooklyn. In November 1964, he was reclassified 1-A (available for military service) when his Local Board learned that he was no longer enrolled as a college student, except for a three credit part-time course at the New School for Social Research. Gearey was ordered to report for pre-induction physical examinations, and on January 4, 1965 he was notified of his acceptability for military service. The following day the Local Board voted not be reconsider Gearey's classification despite his claim that he planned to resume full-time studies in February. Notified of this decision, Gearey wrote to the Board in late January and requested a hearing to discuss his student status. This was granted, and on February 2, 1965 he appeared before the Board with evidence of attendance at a school for motion picture arts and a claim that he planned to re-register at St. Francis College. The Board reclassified Gearey 2-A and directed him to have St. Francis forward proof of his matriculation. The college, however, informed the Board in mid-February that Gearey was no longer a student, and

when he failed to supply the Board with evidence of attendance, he was reclassified 1-A on April 6, 1965. An Order to Report for Induction was mailed on April 19, but four days later the Board received a letter from Gearey requesting that his classification be reviewed[3] and that his date of induction be postponed from May 5 until the end of his spring term at school. The Board deferred his induction and rescheduled it for July. On May 24, Gearey for the first time asked the Local Board to send the special questionnaire for conscientious objectors (SSS Form No. 150). After the questionnaire was returned, the Board invited Gearey to appear for an interview on July 6, and at the same time notified him that the date of his induction was scheduled for July 8. Upon the conclusion of the July 6 hearing, the Board informed Gearey that it believed he was not a "genuine c. o." and that the facts did not warrant a change in his classification.[4] Gearey reported for induction on July 8, 1965 but refused to take the symbolic step forward and was promptly arrested. At his trial before Judge Thomas F. Murphy, sitting without a jury, Gearey

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[3] Gearey stated he would submit proof of attendance at City College and the School of Motion Picture Arts.

[4] The Local Board recorded the following summary of its July 6 hearing with Gearey:

> Registrant interviewed, had decided just recently to become a c.o., said he had been thinking about it but never mentioned it. We reviewed the c.o. #150, also reviewed letter sent by Bishop Ford High School. Registrant claims he is not working there nor that he would definitely be working there in September. Said he would like to go to Europe and take pictures since this is the vocation he wants to pursue or maybe teach when he returns. The board after reviewing the evidence submitted and registrant's claims felt he did not qualify to be a genuine c.o. All facts considered did not warrant a change in classification. He was advised to report as scheduled. Vote was 4 to 0.

was adjudged guilty of failing to submit to induction into the armed forces, and was sentenced to imprisonment for two years.

Early in our nation's history, the government recognized the moral conflict which confronted the members of certain religious sects when they were called to bear arms. Originally, the states were principally in control of conscription, and soon established a pattern of exempting conscientious objectors.[5] When the federal government took control of conscription during the Civil War, this practice was continued.[6] Selective Service System Monograph No. 10, Conscientious Objection 39-41 (1950). During the First World War, the Draft Act of 1917, 40 Stat. 76, 78, required all eligible persons to serve in the armed forces, but permitted conscientious objectors to perform noncombatant duties.

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[5] Among the original 13 Colonies, Massachusetts (1661), Rhode Island (1673), and Pennsylvania (1757), were the first to provide exemptions from combatant services for conscientious objectors. The Pennsylvania legislation, for example, provided that:

> All Quakers, Mennonites, Moravians, and others conscientiously scrupulous of bearing arms, who shall appear on any alarm with the militia, though without arms, and obey the commands of the officers in extinguishing fires, suppressing insurrection of Slaves or other evil-minded persons during an attack, in caring for founded, conveying intelligence as expresses or messengers, carrying refreshments to such as are on duty, and in conveying to places of safety women and children, aged, infirm, and wounded persons, are free and exempt from the penalties of the act.

Selective Service System Monograph No. 11, Conscientious Objection 30 (1950).

[6] The treatment of conscientious objectors in the Confederacy was generally parallel to that in the North. One interesting proposal was made in North Carolina in the early days of the Civil War before the Confederate Government had assumed complete control of conscription. It was suggested that conscientious objectors work in the state's salt mines as an alternative to service in the armed forces. Ibid.

Id. at 54-55. A somewhat similar pattern was adopted by Congress in 1940 in the Selective Training and Service Act, 54 Stat. 889, and again in 1948 when the present draft law, the Universal Military Training and Service Act, was passed. Section 6(j) of the UMT&S Act, 50 U.S.C.App. § 456(j), provides that:

> Nothing contained in this title * * * shall be construed to require that any person be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. * * * Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned and such person shall be notified of the time and place of such hearing. * * * If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board.

[1, 2] The obvious purpose of the statutory scheme which provides for intervention by the Justice Department

into the Selective Service appeal procedure, is to furnish a fount of information concerning an appellant's conscientious objection claim to the Appeal Board, so that a careful and enlightened decision can be reached. The Department's recommendation is based not only on the hearing which it conducts, but also on the report it receives from the FBI concerning the accuracy and sincerity of the applicant's claim. The Justice Department's role in the appeal procedure serves another purpose. It introduces into the inquiry a government agency less intimately associated with the armed forces than the Selective Service System, and not as concerned with meeting fixed quota calls. As a result, a more objective and disinterested approach to granting exemptions can be expected. While it is true that the Department's recommendation is not binding on an Appeal Board, it is unquestionably a significant factor not only in the Board's final determination, but also in any decision that the President may ultimately reach if the case is referred to him.[7]

Gearey vigorously urges on this appeal that he was improperly denied the procedural safeguards in Section 6(j) for taking an appeal from the Local Board's determination that he was not a "genuine c. o." The denial by the Local

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[7] In addition to being notified of the time and place of the Justice Department hearing, the applicant is given the opportunity to be heard, 32 C. F. R. § 1625.25(d); to receive a fair resume of the FBI report, Simmons v. United States, 348 U. S. 397, 75 S. Ct. 397, 99 L. Ed. 453 (1955), and a copy of the Justice Department recommendation, Gonzales v. United States, 348 U. S. 407, 75 S. Ct. 409, 99 L. Ed. 467 (1955); 32 C. F. R. § 1625.25(e); and to file with the Appeal Board a written reply to the recommendation, 32 C. F. R. § 1625.25(e). In certain cases the decision of the Appeal Board may be reviewed by the President, 32 C. F. R. § 1627.1.

Board was based upon its interpretation of 32 C.F.R. § 1625.2[8] which provides:

> The local board may reopen and reclassify anew the classification of the registrant * * * provided * * * *the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction * * * unless the local board first specifically finds there has been a change in registrant's status resulting from circumstances over which the registrant had no control.* 32 C.F.R. § 1625.2 (emphasis added).

[3, 4] The statutory authorization for this regulation is found in 50 U.S.C. App. § 460, which provides that the President may "prescribe the necessary rules and regulations to carry out the provisions of this title," and § 1625.2 in our view is clearly within the bounds of that grant of power. We can see no sound reason why a regulation may not require that claims for deferment should be advanced as soon as they have matured. If young men eligible for the draft are permitted endlessly to challenge their status and to claim review of adverse determinations, the effect on the Selective Service System would be chaotic for manpower quotas could rarely be met with any degree of certainty. This is especially true when the claim for deferment is based on a conscientious objection since a protracted proc-

[8] In 1942, 2 years after the Selective Service Training Act became law, the President promulgated § 626.2 of the Code of Federal Regulations, which was substantially similar to what is today § 1625.2. When Congress passed § 6(j) in 1948, the Report of the Senate Armed Services Committee stated only that "This section reenacts substantially the same provisions as were found in subsection 5(g) of the 1940 act." S. Rep. No. 1268, 80th Cong., 2d Sess. 14.

ess of Justice Department investigation and hearing is required. Years of experience have demonstrated that it is necessary and reasonable to set limits on the time in which a claim must be asserted in the litigation which floods our courts; so, too, it is essential and proper for an administrative agency, particularly one as large and complex as the Selective Service System, to require that claims be raised within reasonable time limits or be forfeited. We hold, therefore, as applied to applicants whose conscientious objections matured prior to receipt of an Order to Report for Induction, § 1625.2 is wholly justified as part of an orderly administrative process.[9] These objectors have have not had "a change in * * * status resulting from circumstances over which * * * [they] had no control." They have had ample opportunity to raise their claim of conscientious objection before an induction notice was sent, and they cannot justly complain that the Local Board refused to reopen their classifications.

[5, 7] The considerations are quite different, however, when a claim of conscientious objection, raised for the first time after receipt of an induction notice, is based on a claim which had not previously matured. Section 6(j) does not set any time limit by which an applicant's conscientious objections must fully crystallize in his mind. It would be improper to conclude that an individual is not a genuine conscientious objector merely because his beliefs did not ripen

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[9] A similar conclusion has been reached by other Circuits. See United States v. Taylor, 351 F. 2d 228 (6 Cir. 1965); United States v. Beaver, 309 F. 2d 273 (4 Cir.), cert. denied, 371 U. S. 951, 83 S. Ct. 505, 9 L. Ed. 2d 499 (1963); Boyd v. United States, 269 F. 2d 607 (9 Cir. 1959); Keene v. United States, 266 F. 2d 378 (10 Cir. 1959); United States v. Schoebel, 201 F. 2d 31 (7 Cir. 1953).

until after he received his notice,[10] although the belatedness of a claim may be a factor in assessing its genuineness. See Clancy & Weiss, "The Conscientious Objector Exemption," 17 Maine L.Rev. 143, 147 (1965); Note, "Pre-Induction Availability of the Right to Claim Conscientious Objector Exemption," 72 Yale L.J. 1459, 1462 (1963). The realization that induction is pending, and that he may soon be asked to take another's life, may cause a young man finally to crystallize and articulate his once vague sentiments. The long history of exempting conscientious objectors, coupled with the specific *statutory* right of appeal, indicate to us a strong Congressional policy to afford meticulous procedural protections to applicants who claim to be conscientious objectors, and indeed to grant deferments in appropriate cases. Implementation of that policy requires that any individual who raises his conscientious objector claim promptly after it matures—even if this occurs after an induction notice is sent but before actual induction—be entitled to have his application considered by the Local Board.[11] In light of this, the Local Board

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[10] The Defense Department has recognized that a genuine claim of conscientious objection may arise even *after induction*. The various military services have therefore provided procedures for investigating such claims, and in appropriate cases for granting discharges. See Department of Defense Directive No. 1300.6, ASD (M) (Aug. 21, 1962); Army Regulation No. 635-20 (Nov. 9, 1962); Department of the Navy, Bupers Instruction 1616.6 (Nov. 15, 1962); Marine Corps Order 1306.16A (Oct. 16, 1962); Air Force Regulation No. 35-24 (March 8, 1963).

[11] Any other conclusion would result in the anomalous situation that individuals whose claims of conscientious objection mature either prior to receipt of a notice of induction or after induction itself, would be permitted to apply for deferment, while those whose beliefs formed during the interim period, would not be able to properly raise their claims. It would appear this is so because Department of Defense Directive No. 1300.6 states:

> Federal courts have held that a claim to exemption from military service under the UMT&S Act must be interposed

must first determine when an applicant's beliefs matured. If the Board properly concludes that the claim existed before the notice was sent, the classification may not be reopened.[12] If the Board finds, however, that the applicant's beliefs ripened only after he received his notice, and that his beliefs qualify him for classification as a conscientious objector then a change in status would have occurred "resulting from circumstances over which the registrant had no control," and he would be entitled to be reclassified by the Local Board.[13]

[8] While action by the Local Boards in accordance with this interpretation of the Regulation should avoid difficulty in the future, it remains to apply these principles to Gearey's case. The difficulty arises from the form of the Board's finding. If the Board had found that Gearey's beliefs after the induction notice were no different than

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prior to notice of induction and failure to make timely claim for exemption constitutes waiver of the right to claim. Therefore, request for discharge after entering military service, based solely on conscientious objection which existed but was not claimed prior to induction or enlistment, cannot be entertained. Similarly, requests for discharge based solely on conscientious objection claimed and denied by Selective Service prior to induction cannot be entertained.

[12] This result is dictated not only by § 1625.2, but in most cases by § 1625.1(b) as well. "Each classified registrant and person who has filed a request for the registrant's deferment shall, within 10 days after it occurs, report to the local board in writing any fact that might result in the registrant being placed in a different classification * * *." 32 C. F. R. § 1625.1(6). See Keene v. United States, supra, 266 F. 2d at 384. In United States v. Corliss, 280 F. 2d 808, 812, cert. denied, 364 U. S. 884, 81 S. Ct. 167, 5 L. Ed. 2d 105 (1960), we inferentially approved the application of that section to conscientious objector claims.

[13] See Keene v. United States, 266 F. 2d 378, 384 (1959). But see United States v. Taylor, 351 F. 2d 228 (6 Cir. 1965); Boyd v. United States, 269 F. 2d 607 (9 Cir. 1959); United States v. Schoebel, 201 F. 2d 31 (7 Cir. 1953).

before, that would have sufficed, provided the judge found a rational basis for it. Again, if the Board had said clearly that in its view Gearey never had been and was not now "a genuine c. o.," that too would have sufficed, subject to the same proviso, since there could not be "a change in the registrant's status resulting from circumstances over which the registrant had no control" if there had been no change at all. The Board's determination as to the sincerity of the claim, while ordinarily subject to an appeal with the safeguards of § 6(j), would not be in these circumstances because of the applicability of § 1625.2 to conscientious objector claims. While the Board's finding that Gearey was not "a genuine c. o." may have been a shorthand manner of expressing one or the other of the above views, it might also have meant that the Board was refusing to reopen on the ground that Gearey had not advanced his claim before the mailing of the induction notice, even though the claim had not matured until later.

[9] We see no reason, however, why the Board's failure to speak with pristine clarity should require dismissal of this indictment. A remand should enable the judge to ascertain from the Local Board precisely what it meant. Compare United States v. Jakobson, supra, 325 F.2d at 417; United States v. Balogh, 157 F.2d 939, 944 (2 Cir. 1946), judgment vacated on other grounds, 329 U.S. 692, 67 S.Ct. 525, 91 L.Ed. 605 (1947). If it meant either that Gearey never was "a genuine c. o." or that whatever his beliefs were on the subject, they had matured before the induction notice was sent, and if the judge is convinced of the rationality of such a view, Gearey's conviction may stand;[14] otherwise the indictment must be dismissed.

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[14] The only objection to this course—that if Gearey had been clearly told of the Local Board's position, he might have submitted to induction—would be wholly inconsistent with the record of his insistence on pressing his claim at all costs.

[10, 11] Of the other grounds for reversal presented by appellant, only one merits discussion. Relying on United States v. Vincelli, 215 F.2d 210 (1954), Gearey argues that the law in this Circuit is that the Local Board reopens an applicant's classification—entitling him to a personal appearance and an appeal[15]—when it sends him a conscientious objector form. To understand why this is not the law, an earlier decision by this Court must be examined. In United States v. Packer, 2 Cir., 200 F.2d 540 (1952), appellant had requested a conscientious objector form after receiving his notice of induction. A letter from the Regional Director of the Selective Service to the Local Board suggested that Packer's classification had been reopened when the Board sent the form, and Packer was therefore allowed to proceed to the Appeal Board. This Court later reversed a conviction for failure to submit to induction, because at his hearing before the Department of Justice Packer had been denied the right to examine the FBI report. In arriving at its decision, the Court held that the letter from the Regional Director *and the appeal* that packer was given, constituted a reopening which prevented the Government from contending that the applicant had waived his rights. The Supreme Court, however, reversed our decision on the ground that the refusal to allow Packer to see the FBI report did not amount to a violation of due process. United States v. Packer, reversed sub nom., United States v. Nugent, 346 U.S. 1, 73 S.Ct. 991, 97 L.Ed. 1417 (1953). The reopening question

[15] If a classification is reopened, the Local Board must cancel any Order to Report for Induction, 32 C. F. R. § 1625.14, and must reclassify the registrant, 32 C. F. R. § 1625.11. The registrant is then entitled to a notice of his reclassification, 32 C. F. R. § 1625.12, and to an appearance before the Local Board and an appeal from its decision, 32 C. F. R. § 1625.13.

was not passed upon. Six years later, however, in United States v. Vincelli, supra, a panel of this Court citing our earlier holding in *Packer*, held that sending a form constituted a reopening. On rehearing, though, 216 F.2d 681 (1954), two of the judges indicated that the Supreme Court's decision in *Nugent* had interpreted the law otherwise. We believe their view is the proper one, for had the Supreme Court decided that there had been a reopening, it would necessarily have affirmed our decision in *Packer* on the ground that appellant had been denied his basic statutory right to a personal appearance before the Local Board and to an appeal. By reversing, however, the Court inferentially indicated its view that sending a conscientious objector questionnaire is not, *ipso facto*, a reopening of the registrant's classification.

Vacated and remanded for further proceedings.

1st Court of Appeals Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-first day of October one thousand nine hundred and sixty-six.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,

HON. HENRY J. FRIENDLY,
HON. IRVING R. KAUFMAN,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

DAVID ARTHUR GEAREY,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is vacated and that the action be and it hereby is remanded for further proceedings in accordance with the opinion of this court.

A. DANIEL FUSARO
Clerk

1st District Court Opinion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

65 Cr. 828

UNITED STATES OF AMERICA,

—against—

DAVID ARTHUR GEAREY,

Defendant.

MURPHY, *D.J.*

Defendant waived a jury and was tried by the court on February 16 and March 1, 1966, on an indictment charging him with knowingly refusing to submit to induction into the Armed Forces of the United States pursuant to the Universal Military Training and Service Act, 50 App. U.S.C. §451, et seq., in violation of 50 App. U.S.C. §462(a) and 32 C.F.R. §1632.14. On the last mentioned date he was found guilty by the court. Although not requested to find the facts specially pursuant to Rule 23(c) of the Federal Rules of Criminal Procedure, we believe it desirable to do so.

In 1960 defendant registered with his local draft board. On November 14, 1961, he was classified 1-A but upon receiving notice from St. Francis College that the defendant was attending that institution and pursuing a normal course of study in his sophomore year, the local board reclassified

the defendant 2-S. This last classification continued through June, 1964, when the defendant was to graduate. On November 5, 1964, he was again reclassified 1-A and on November 24, 1964, was ordered to report for a pre-induction physical on December 18, 1964. On December 7, 1964, the board received a letter from the defendant dated November 30th advising that he was taking three credits to fulfill his course requirements for a B.A. degree which he would receive in January of 1965, and that he expected to return to school full time in February to pursue a Master's Degree.[1] The pre-induction physical was had and on January 4, 1965, a notice of acceptability was mailed to the defendant. On January 5, 1965, the local board reviewed the file in light of the defendant's correspondence and voted "no change." Notification was sent on January 6, 1965. On January 19, 1965, the local board received a letter from the defendant wherein the latter advised that he had registered in one school and was "in the process of registering at another college in the area of Cinematography;" he expressed his belief that he would be entitled to a student deferment upon beginning studies at both schools and stated that he "would like to apply for a hearing . . . in order to discuss my status as a student." On the same day, the board directed the defendant to report for an interview. On February 2, 1965, the board interviewed the defendant; the minutes reflect the following:

> "Registrant appeared with evidence of attendance at a School for Motion Picture Arts and asked us to defer him so that he could finish his seminar. Also claimed

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[1] The board had received on October 13, 1964, a communication from the New School for Social Research advising that the defendant had been admitted as a non-matriculating student in "part time course of instruction for the fall 1964 semester. (3 credits)."

he would reregister at St. Francis and was asked to have St. Francis forward to the Board evidence of such attendance. A vote was taken and registrant was classified 2S."

On February 18, 1965, the board received a communication from St. Francis College advising that the defendant was no longer in attendance there. A request for evidence of attendance was immediately mailed to the defendant. On April 6, 1965, nothing having transpired in the meantime, the board voted and reclassified defendant 1-A and sent him notice the next day. On April 19, 1965, the board mailed the defendant an Order to Report for Induction on May 5, 1965. On April 23, 1965, the board received a letter from the defendant, dated April 21st, wherein the defendant acknowledged receipt of the notice of his classification and the induction order; he acknowledged also that he was aware that he had not appealed within the prescribed time; he asked, however, that the board "defer my impending draft notice and review my classification as a student, at least until the termination of this term;" he indicated that he was prepared to submit proof of attendance at City College, in addition to the School of Motion Picture Arts. On the day his letter was received the defendant was mailed a request for proof of attendance, notified his induction was postponed until July, and advised for the future to notify his local board of any change in status within ten days of its occurrence.

On May 24, 1965, the local board received a letter dated May 21st from the defendant which stated as follows:

"For the past several years, I have been concerned with the problem of the conscriptive service as it effects me.

I have tried to work out the problem in my own mind and have occasionally discussed it with friends. I realized that if and when I came to the draft board, I would not be in a position to discuss the problem with you, rather, I would have to confront the board with my feelings and beliefs. Once I had resolved the problem in my own mind, I refrained from notifying the board because I felt quite secure with my status as a student, and I thought that I would have plenty of time to inform you after completion of school. However, my recent call to the service has rocked me out of that lethargy, and cured me of my procrastination. Therefore, I am requesting the necessary papers required in order that I may legally apply for the classification of conscientious objector."

The form for conscientious objectors was sent to the defendant the same day, to be returned on or before June 4, 1965. It was received completed on June 7, 1965. On June 17, 1965, the board wrote the defendant to report for an interview on July 6, 1965, and on the same day notified him on the appropriate form that his induction date was July 8, 1965. On July 1, 1965, the board received a letter from the defendant, dated June 29, 1965, wherein he stated that he would like to change his answer to that question on the conscientious objector's form which asked if he was a member of a religious sect or organization from "no" to "yes," and advised that he was a baptized member of the Catholic Church, and expressed his opinion that "membership in the Catholic Church does not contradict anything I may claim as an objector." On July 2, 1965, the board received a letter dated July 1, 1965, from the principal of Bishop Ford High School wherein it was stated that the defendant

had been hired to teach at that institution as of June, 1965, apparently to commence teaching in the fall. On July 6, 1965, the defendant was interviewed by his local board which recorded the following:

> "Registrant interviewed, had decided just recently to become a c.o., said he had been thinking about it but never mentioned it. We reviewed the c.o. form #150, also reviewed letter sent by Bishop Ford High School. Registrant claims he is not working there nor that he would be definitely working there in September. Said he would like to go to Europe and take pictures since this is the vocation he wants to pursue or maybe teach when he returns. The board after reviewing the evidence submitted and registrant's claims felt he did not qualify to be a genuine c.o. All facts considered did not warrant a change in classification. He was advised to report as scheduled. Vote was 4 to 0."

On July 8, 1965, the defendant apeared at his induction center but refused to be inducted.

The Universal Military Training and Service Act contains an exemption from combatant training and service for conscientious objectors which provides, in pertinent part:

> "Nothing contained in this title . . . shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form . . . . Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appro-

priate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing." 50 App. U.S.C. §456(j).

The statute does not limit the time within which the claim must be made but the Code of Federal Regulations under which the Act is administered prescribes the classification procedure. Thus, after a registrant is notified of his classification, he may, within ten days, either appeal the classification to an appeal board, 32 C.F.R. §1626.1 et seq., or request a personal appearance before his local board, §1624.1(a). If he elects to follow the latter course, the board may reopen and reclassify the registrant, or refuse to reopen, §1624.2(c), and in either case, the registrant is again entitled to notice of the decision, §1624.2(d) and has the same right of appeal as in the case of the original classification, §1624.2(e). Further, should some fact occur which might result in a different classification, the registrant is required to report such fact within ten days after its occurrence, §1625.1(b). The board is empowered to reopen the registrant's classification upon a written request presenting facts not previously considered, which, if true, would justify a change in classification, *provided, however,* "the classification . . . shall not be reopened after the local board has mailed . . . an Order to Report for Induction . . . unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control," §1625.2. If a registrant's request fails to present facts not previously considered, or such facts are presented but the local board is of the opinion that, if true, they would not justify a change in the registrant's classification, it shall not

reopen the classification, §1625.4. But once a local board does reopen a classification, it shall again classify the registrant in the same manner as if he had never before been classified, even though he be given the same classification, and cancel any outstanding Order to Report for Induction. §1625.11-1625.14.

In the instant case the defendant did not, within the time limits prescribed, request a personal appearance under §1624.1(a) or appeal under §1626.1 et seq., from the classification of April 6, 1965, which resulted in an Order to Report for Induction. It wasn't until more than a month later, and until after he had secured a postponement of his induction date that he first raised the claim of conscientious objections. It is, however, defendant's initial contention that he cannot be deprived of his statutory exemption or his right to appeal a denial of the exemption by §1625.2 of the regulations. We do not agree.

That part of 32 C.F.R. §1625.2 proscribing a reopening after an Order to Report for Induction has been mailed unless the local board "first specifically finds . . . a change in . . . status resulting from circumstances over which the registrant had no control" does not specifically require that the change, if it exists, must have occurred subsequent to the Order to Report for Induction, but we are persuaded that the weight of authority is to the effect that where conscientious objections mature prior to the mailing of the Order to Report for Induction, §1625.2 effectively restricts the exemption granted in 50 App. U.S.C. §456(j). United States v. Taylor, 351 F.2d 228 (6th Cir. 1965); United States v. Beaver, 309 F. 2d 273 (4th Cir. 1962) cert. denied, 371 U.S. 951 (1963); Keene v. United States, 266 F.2d 378 (10th Cir. 1959); United States v. Vincelli, 216 F.2d 681, 682 (2d

Cir. 1954), (dictum). We do not regard United States v. Clark, 105 F.Supp. 613 (W.D.Pa. 1952) and United States ex rel. Berman v. Craig, 207 F.2d 888 (3d Cir. 1953) as contra to, but as limiting this proposition since in *Clark* the Order to Report for Induction was mailed before the registrant's time to appeal the board's refusal to reopen had expired, §1626.2, and in *Berman* the Order to Report for Induction was mailed prior to the expiration of ten days since the change in status had occurred, §1625.1(b).

Where, however, the conscientious objections mature subsequent to the mailing of the Order to Report for Induction there are differing opinions as to whether the accession of conscientious objections can qualify as a change in status over which the registrant had no control. Those courts which think not, have upheld determinations not to reopen by local boards. United States v. Porter, 314 F. 2d 833, 836 (7th Cir. 1963); Boyd v. United States, 269 F. 2d 607, 610 (9th Cir. 1959); United States v. Schoebel, 201 F.2d 31, 32-33 (7th Cir. 1953).

We disagree with those courts on this point. The accession of beliefs which require one to put forth conscientious objections is, in our opinion, a change of status. We do not believe the change to be one over which a registrant has *no* control, but are not inclined to believe that the regulation should operate to penalize a registrant for not earlier acceding to ideas not yet solidified in his mind or to compel exercise of his free will to reject what to him have become indisputable truths. At least one court supports the applicability of the "change of status" provision of §1625.2 to claims of conscientious objectors and has concluded therefore that should it be a fact that the objections matured subsequent to the Order to Report for Induction, reopening and reclassification are required. United States v. Keene,

supra, 266 F. 2d at 384. It follows that a local board must give consideration to such a claim before determining not to reopen.

In the instant case the local board did consider the defendant's claim of having acquired conscientious objections and of having acquired them subsequent to the Order to Report for Induction. The board interviewed the defendant in person. It had before it defendant's letter of May 21, 1965, wherein the claim was raised for the first time; it had before it the conscientious objector's form completed by the defendant; it had before it defendant's letter of June 29, 1965, wherein he corrected an answer to a question on the conscientious objector's form and explained why he had first answered as he had and why he felt he could be both a Roman Catholic and a conscientious objector. And, not least in importance, it had before it defendant's classification history. After completing his attendance at St. Francis in pursuit of a B.A. degree, defendant's next request for a deferment (letter of November 30, 1965) was based on his status as a student. This claimed status was also the basis of his requests of January-February, 1965 (which resulted in a deferment) and of April, 1965 (which resulted in a postponement of induction). It was not until he had apparently exhausted his chances of further deferment or postponement on this ground that he interposed the claim of conscientious objections. While it is defendant's claim that his objections matured after the Order to Report for Induction, neither we nor the board were required to ignore this chronology. "Sudden accessions of belief may be utterly sincere, as the memorable one on the Damascus Road; but they seldom synchronize so perfectly . . . with external facts making them convenient, and they normally manifest themselves in

expressions more deeply personal. . . ." United States v. Corliss, 280 F. 2d 808, 812 (2d Cir. 1960) cert. denied 364 U. S. 884 (1960). The local board apparently found not that the objections matured either before or after the Order to Report for Induction but that the defendant was not a genuine conscientious objector. In effect, it found that there was no "change in status," or, in terms of the regulation, it did not "first specifically find . . . a change in . . . status." We have read the entire file and are unable to conclude that the board's failure to so find was without any basis in fact. Cf. United States v. Jakobson, 325 F.2d 409, 412 (2d Cir. 1963) aff'd 380 U.S. 163 (1965), and the cases cited therein. Accordingly, the board had no power to reopen the defendant's classification. 32 C.F.R. §1625.2.

We understand that the effect here given §1625.2 deprives the defendant of administrative review of the local board's action. But we see in this no greater restriction on 50 App. U.S.C. §456 (j) than occurs when the conscientious objections mature prior to the Order to Report for Induction and are interposed subsequently. United States v. Taylor, supra; United States v. Beaver, supra; Keene v. United States, supra; United States v. Vincelli, supra.

We should also make mention of United States v. Underwood, 151 F. Supp. 874 (E.D.Pa. 1955) and United States v. Crawford, 119 F.Supp. 729 (N.D. Cal. 1954) cited by defendant. We feel that these cases can be distinguished in that in neither did the local board even consider the claims; but insofar as they are not distinguishable, see Boyd v. United States, supra, 269 F. 2d at 612.

It is next argued that the board's action in sending, receiving and reviewing the conscientious objector's form, and in interviewing the defendant constituted a reopening which entitled the defendant to a cancellation of the Order to Re-

port for Induction and to all rights of a newly classified registrant, 32 C.F.R. §§1625.11-1625.14. We do not reach the question of whether §1625.2 can be claimed after a board in fact does reopen since we find no such fact here. The board was required to send the form when it was requested, 32 C.F.R. §1621.11. The defendant had no procedural right to a hearing, as exists where there is timely request after a classification, §1624.1(a), but the interview was one of the factors we considered in determining whether the board gave the required consideration to the claim. By requiring, as we do, the board to look into a claim of conscientious objections interposed after the Order to Report for Induction to determine whether there has been a change in status which warrants a reopening, and to hold, as we are asked, that this consideration itself amounts to a reopening would in effect compel reopening whenever a claim of conscientious objections is interposed. We have already expressed our views on the efficacy of §1625.2. See also United States v. Beaver, supra, 309 F. 2d at 277; Boyd v. United States, supra, 269 F.2d at 610. Defendant's reliance on United States v. Vincelli, 215 F. 2d 210, 212-213 (2d Cir. 1954) is misplaced. That case, which relied on *dictum* in a subsequently overruled case, United States v. Racker, 200 F. 2d 540, 541 (2d Cir. 1952), rev'd 346 U.S. 1 (1953), is factually distinguishable. See the opinion in the *Vincelli* case on the petition for rehearing, 216 F. 2d 681, 682.

Defendant's final argument is that he was denied procedural due process by the board's failure to send written notification of its decision not to reopen as required by §1625.4, which regulation, defendant assumes, applies in every case where the board decides not to reopen. We are not certain the premise is valid. Section 1625.4, insofar as

it is pertinent here, requires notice where the board refuses to reopen because it is of the opinion that the facts alleged, if true, *would not* justify a change of classification. The new fact alleged by the defendant was the accession of conscientious objections. If true this *would* indeed compel a change in classification. Thus it appears the board did not act under §1625.4 and that that regulation is not applicable. But see United States v. Beaver, supra, 309 F. 2d at 277, where the board's decision was couched in the language of §1625.2, and the court assumed the applicability of §1625.4. Also, it may be argued that the new facts alleged by the defendant was not his status as a conscientious objector but his particular beliefs, and that the board's decision was that such beliefs, if they existed, would not constitute conscientious objections within the meaning of §456(j), bringing the board's decision within the language of §1625.4. Assuming arguendo, that for one reason or another the defendant was entitled to notice under §1625.4, we are not convinced that the defendant was so deprived as to require acquittal. In *Beaver,* instead of notice of the board's determination, the defendant was sent a letter advising him when to report for induction, which had theretofore been postponed. The court held this to fulfill the notice requirement of §1625.4. In the instant case defendant was told by the board of its decision at the conclusion of the interview of July 6, 1965, and that he was required to report for induction as previously directed. We see no deprivation which requires acquittal.

In accordance with our findings and conclusions as are herein expressed we found the defendant guilty.

THOMAS F. MURPHY
U.S.D.J.

Dated, New York, N. Y., March 14, 1966.

1st District Court Judgment

UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF NEW YORK

No. 65 Cr. 828

UNITED STATES OF AMERICA

v.

DAVID ARTHUR GEAREY

On this 19th day of April, 1966 came the attorney for the government and the defendant appeared in person and by counsel

IT IS ADJUDGED that the defendant has been convicted upon his plea of Not Guilty and a finding of Guilty by the Court, the defendant having waived trial by jury of the offense of unlawfully and knowingly, upon reporting for induction pursuant to an Order to Report of Induction mailed to him by his Local Board, failing, neglecting and refusing to submit to induction into the Armed Forces of the United States (Title 50, Appendix, U.S. Code, Section 462(a); 32 Code of Federal Regulations, Section 1632.14) as charged

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Two (2) Years.

The defendant is continued in the custody of his attorney until April 20, 1966 on which date he shall post bail pending appeal fixed in the sum of $2,000.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

THOMAS F. MURPHY
United States District Judge.

John J. Clear, Jr.
Clerk.

Regulations

Title 32, Code of Federal Regulations

§1625.2 When registrant's classification may be reopened and considered anew.

"The local board may reopen and consider anew the classification of a registrant (a) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (b) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252) or an Order to Report for Civilian Work and Statement of Employer (SSS Form No. 153) unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."

§1625.4 Refusal to reopen and consider anew registrant's classification.

"When a registrant, any person who claims to be a dependent of a registrant, any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, or the government appeal agent files with the local board a written request to reopen and consider anew the registrant's classification and the local board is of the opinion that the information accompanying such request fails to present any facts in addition to those considered when the registrant was classified or, even if new facts are presented, the local board is of the opinion that such facts, if true, would not justify a change in such registrant's classification, it shall not reopen the registrant's classification. In such a case, the local board, by letter, shall advise the person filing the request that the information submitted does not warrant the reopening of the registrant's classification and shall place a copy of the letter in the registrant's file. No other record of the receipt of such a request and the action taken thereon is required."

§1625.11 Classification considered anew when reopened.

"When the local board reopens the registrant's classification, it shall consider the new information which it has received and shall again classify the registrant in the same manner as if he had never before been classified. Such classification shall be and have the effect of a new and original classification even though the registrant is again placed in the class that he was in before his classification was reopened."

§1625.12 Notice of action when classification considered anew.

"When the local board reopens the registrant's classification, it shall, as soon as practicable after it has again classified the registrant, mail notice thereof on Notice of Classification (SSS Form No. 110) to the registrant and on Classification Advice (SSS Form No. 111) to the persons entitled to receive such notice or advice on an original classification under the provisions of §1623.4 of this chapter."

§1625.13 Right of appeal following reopening of classification.

"Each such classification shall be followed by the same right of appearance before the local board and the same right of appeal as in the case of an original classification."

§1625.14 Cancellation of Order to Report for Induction or for Civilian Work by reopening of classification.

"The reopening of the classification of a registrant by the local board shall cancel any Order to Report for Induction (SSS Form No. 252) or Order to Report for Civilian Work and Statement of Employer (SSS Form No. 153) which may have been issued to the registrant, except that if the registrant has failed to comply with either of those orders, the reopening of his classification thereafter by the local board for the purpose of placing him in Class IV-C or Class V-A shall not cancel the order with which he failed to comply."

Title 32, Code of Federal Regulations

§1626.25 Special provisions when appeal involves claim that registrant is a conscientious objector.

"(a) If an appeal involves the question whether or not a registrant is entitled to be sustained in his claim that he is a conscientious objector, the appeal board shall tentatively determine whether or not the registrant is eligible for classification in a class lower than Class I-O or in Class I-O. If the appeal board finds that the registrant is eligible for classification in Class I-O or in a lower class, it shall place him in the appropriate class.

"(b) If the appeal board tentatively determines that the registrant is not entitled to classification in either a class lower than Class I-O or in Class I-O, it shall transmit the entire file to the United States Attorney for the Federal judicial district in which the appeal board has jurisdiction for the purpose of securing an advisory recommendation from the Department of Justice.

"(c) No registrant's file shall be forwarded to the United States Attorney by any appeal board unless the record on the Classification Questionnaire (SSS Form No. 100) shows and the letter of transmittal states that the appeal board reviewed the file and tentatively determined that the registrant should not be classified in Class I-O or in a lower class. Any file forwarded to the United States Attorney without the information required by this paragraph shall be returned to the appeal board.

"(d) Whenever a registrant's file is forwarded to the United States Attorney in accordance with paragraphs (b) and (c) of this section, the Department of Justice shall thereupon make an injuiry and hold a hearing on the character and good faith of the conscientious objections of the registrant. The registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard. If the objections of the registrant are found to be sustained, the Department of Justice shall recommend to the appeal board (1) that if the registrant is inducted into the armed forces, he shall be assigned to noncombatant service, or (2) that if the registrant is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of induction be ordered by his local board to perform for a period of twenty-four consecutive months civilian work contributing to the maintenance of the national health, safety, or interest. If the Department of Justice finds that the objections of the registrant are not sustained, it shall recommend to the appeal board that such objections be not sustained.

"(e) Upon receipt of the recommendation of the Department of Justice, the appeal board shall mail a copy thereof to the registrant together with a letter advising the registrant that, within thirty days after the date of such mailing, he may file with the appeal board a written reply concerning the recommendation of the Department of Justice. Upon receipt of the reply of the registrant or the expiration of the period afforded him to make such reply, whichever occurs first, the appeal board shall determine the classification

of the registrant, and in its determination it shall give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice. The appeal board also shall give consideration to any reply to such recommendation received from the registrant. The appeal board shall place in the Cover Sheet (SSS Form No. 101) of the registrant the recommendation of the Department of Justice, a copy of its letter transmitting a copy of such recommendation to the registrant, and any reply to such recommendation received from the registrant."